IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 260 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHHANABHAI ARJANBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1, MS NITA C BANKER for Appellant(s) : 1,
MS MITA S. PANCHAL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 19/11/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.0 This appeal is directed against the judgment and order dated 1st March, 1999 passed by the learned Sessions Judge, Rajkot in Sessions Case No. 129 of 1998 whereby, the appellant – accused was convicted for the offences punishable u/s. 302 of the Indian Penal Code (for short, "the I.P.C.") and Section 135 of the Bombay Police Act (for short, "the B.P. Act"). For conviction u/s. 302 of the I.P.C., the appellant was sentenced to undergo imprisonment for life. No separate sentence was awarded for conviction u/s. 135 of the B.P. Act. The appellant was given the benefit of set-off.

2.0 The brief facts of the prosecution case are as under;

2.1 Deceased – Vikrambhai Bhikhabhai was a native of Village Mojira, Taluka Upleta of Rajkot District and was earning his livelihood by doing masonry work. At about two months prior to the alleged incident in question, the deceased had helped the appellant herein and one

Bhanubhai Ramjibhai by getting them employment at the place where the deceased was working. During that period the appellant and said Bhanubhai Ramjibhai were residing along with the deceased.

2.2 At about ten days prior to the alleged incident in question, said Bhanubhai Ramjibhai was to proceed to his native place. At that time, the deceased gave a sum of Rs.1000/- to said Bhanubhai Ramjibhai requesting him to hand over the same to his family who are residing in his native place since said Bhanubhai Ramjibhai also lived in the same Village. Two to three days thereafter, the deceased realized that an amount of Rs.2000/- was missing from his suitcase. The deceased felt that the appellant was behind the said theft as a result of which a quarrel took place between the deceased and the appellant. After the said quarrel, the appellant left for his Village.

2.3 On 26.05.1998, at around 1830 hrs., the appellant proceeded towards Rajkot City where he and the deceased were working. On 27.05.1998, at around 0430

hrs., the appellant reached the place where the deceased was residing and noticed that the deceased was sleeping on a heap of sand. The appellant attacked the deceased with a knife which he had brought along with him on account of which the deceased shouted for help and followed the assailant up to a certain distance and, thereafter, fell down on the road. By that time, other co-labourers who were residing near the said place gathered at the scene of incident. An ambulance from Rajkot Civil Hospital was called for so as to take the deceased to the Hospital. At the Hospital, necessary primary treatment was given to the deceased.

2.4 The Police Constable who was on duty in the Hospital telephonically informed about the same to Malviyanagar Police Station. On receipt of the information, an entry to that effect was made by the P.S.O. in the Station Diary as also in the *'Janwajog'* Register. A *'yaadi'* was given to P.S.I. - one Mr. Rathod for carrying out necessary investigation. The said P.S.I. went to the Civil Hospital and recorded the complaint of the deceased and, later, sent the

same to the Police Station, along with a forwarding letter, for the purpose of registering the offence.

2.5 On receipt of the same, a complaint for offences punishable u/s. 307 of the I.P.C. and Section 135 of the B.P. Act was registered vide I – C. R. No. 174 of 1998. In the meanwhile, a police *'yaadi'* was also sent to the Executive Magistrate for the purpose of recording the Dying Declaration of the deceased. The same was subsequently carried out by the Executive Magistrate.

2.6 At around 0825 hrs., the deceased succumbed to his injuries. In the meantime, investigation was taken over by the P. I. - Mr. Kalekhan Alamkhan Kureshi. Necessary entries with regard to the death of the deceased were made in the Station Register and a Report for the addition of Section 302 in the complaint was also sent to the learned Judicial Magistrate, First Class, Rajkot.

2.7 The Investigating Officer went to the scene of offence and carried out *'panchnama'* of the scene of offence.

Necessary *'muddammal'* articles were also collected. Thereafter, he went to the Civil Hospital and performed inquest *'panchnama'* of the dead body of the deceased. *'Marnottar'* form was filled up and necessary arrangement was made for sending the dead body for performing post-mortem. The clothes on the body of the deceased were seized by way of a separate *'panchnama'*. Thereafter, the *'muddamal'* articles so collected were sent to F.S.L. for examination. On receipt of the F.S.L. Report, PM note and other Reports, they were kept in the investigation file.

2.8 Further investigation was carried out and statements of several witnesses were recorded. On 28.05.1998 the appellant produced himself before the Police Station. Arrest *'panchnama'* was prepared in the presence of *'panchas'*. The clothes worn by the appellant at the relevant point of time were also seized by way of a separate *'panchnama'*. During the course of interrogation, as the appellant showed willingness to produce the weapon – knife used in the commission of the alleged offence in question, the same was recovered by way of a separate *'panchnama'* in

the presence of *'panchas'*.

2.9 On completion of investigation, charge-sheet was filed against the appellant in the Court of learned Judicial Magistrate First Class, Rajkot. As the case was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Rajkot committed the case to the District & Sessions Court, Rajkot and the same was numbered as Sessions Case No.129 of 1998. The matter was then transferred to the learned Addl. Sessions Judge for disposal on merits. On production of the appellant, the learned Addl. Sessions Judge framed the charge and as the appellant pleaded not guilty to the said charges, trial was conducted against him.

3.0 The prove the guilt against the appellant, the prosecution had examined in all twenty three witnesses namely, PW – 1 Balaji Subramaniam at Exhibit – 8, PW – 2 Sarojben w/o. Balaji Subramaniam at Exhibit – 9, PW – 3 Bhanubhai Ramjibhai at Exhibit – 10, PW – 4 Laxmanbhai Arjanbhai Dangar at Exhibit – 11, PW – 5 Abbasbhai

Saifuddinbhai at Exhibit – 12, PW – 6 Hamirbhai Shankarbhai Gokani at Exhibit – 13, PW – 7 Dr. Amrutlal Devjibhai Parmar at Exhibit – 17, PW – 8 Bhikhabhai Hamirbhai Ramani at Exhibit – 24, PW – 9 Ashokbhai Ranabhai Varaniya at Exhibit – 26, PW – 10 Ranabhai Rajabhai Ahir at Exhibit – 27, PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28, PW – 12 Rameshchandra Gangadhar Jani at Exhibit – 30, PW – 13 Dr. Mahendra Chunilal Chavda at Exhibit – 35, PW – 14 Sitarbhai Hasambhai Pijara at Exhibit – 31, PW – 15 Ravatbhai Parbatbhai Aahir at Exhibit – 38, PW – 16 Anilkumar Ramaniklal Raval at Exhibit – 40, PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43, PW – 18 Mansinh Khodubhai Parmar at Exhibit – 44, PW – 19 Ramjibhai Umarbhai Sumara at Exhibit – 48, PW – 21 Babubhai Deshadbhai at Exhibit – 53, PW – 22 Nathabhai Haribhai Rathod at Exhibit – 57 and PW – 23 Kalekhan Kureshi at Exhibit – 60.

3.1 The prosecution had also relied upon several documentary evidence, more particularly, the evidence in the form of *'panchnama'* of the scene of offence at Exhibit –

14, the PM note at Exhibit – 20, the Inquest *'panchnama'* at Exhibit – 29, the arrest *'panchnama'* at Exhibit – 39, the discovery *'panchnama'* at Exhibit – 25, the Dying Declaration at Exhibit – 42, the F.S.L. Report at Exhibit – 67 and the Serological Report at Exhibit – 68.

3.2 On submission of the closing *'purshis'*, the further statement of the appellant was recorded u/s. 313 of the Code of Criminal Procedure, 1973. After hearing learned counsel for the respective parties, the learned Addl. Sessions Judge passed the impugned judgment and order convicting the appellant and imposing sentence as stated in the earlier part of this judgment. Hence, the present appeal.

4.0 Ms. Nita C. Banker learned Advocate for the appellant has submitted that there is not an iota of evidence on record to connect the appellant with the crime in question except the clothes seized from the body of the appellant which were having blood stains similar to the Blood Group of the deceased. She has submitted that as per the evidence on record, the Blood Group of both the

deceased and the appellant are same [Blood Group 'B'] and, therefore, it could not be concluded that the human blood stains found on the clothes of the appellant were that of the deceased.

4.1 Learned Advocate has submitted that the Dying Declaration at Exhibit – 42 also does not support the case of the prosecution. She has contented that in the Dying Declaration at Exhibit – 42, the deceased has categorically narrated that some "*unknown person*" had inflicted the said blows on him meaning thereby, that no specific narration about the appellant has been made. Therefore, the Dying Declaration at Exhibit – 42 also will not be of any use to the prosecution.

4.2 Learned Advocate has further submitted that the evidence of the two witnesses on whom the prosecution has placed heavy reliance, viz. PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 and PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 could not be relied upon inasmuch as they are hear-say witnesses and are also close relatives of

the deceased persons. She has submitted that both these witnesses have admitted in their cross-examinations that the facts narrated by them before the Court below were not narrated by them before the police or any other persons meaning thereby, that they had narrated the said facts before the Court below for the first time only. Thus, their evidence cannot be said to be reliable and free from all doubts.

4.3 Learned Advocate has further contented that the prosecution has not examined two important persons as witnesses viz. (i) Pareshbhai Patel – whose name appears in the deposition of both PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 and PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 and (ii) Arjanbhai Shivabhai – who is the father of the appellant and whose name appears in the deposition of PW – 4 Laxmanbhai Arjanbhai Dangar at Exhibit – 11. Therefore, there is serious lacuna in the case of the prosecution so far as the above-referred aspect is concerned.

4.4 Learned Advocate has further contented that so far as the so-called “extra-judicial confession” made by the appellant is concerned, PW – 4 Laxmanbhai Arjanbhai Dangar at Exhibit – 11 has admitted in his evidence that he was informed about the alleged incident in question by the father of the appellant – Arjanbhai Shivabhai and that whatever he has deposed before the Court, the same was deposed as per the information received by him from the father of the appellant. Learned Advocate has, therefore, submitted that the evidence of this witness is hear-say evidence and the Court below ought not to have relied upon the same by treating as “extra-judicial confession”. Hence, the impugned judgment passed by the Court below deserves to be quashed and set aside.

4.5 Learned Advocate has lastly submitted that if this Court is not inclined to entertain the appeal, then it may acquit the appellant on the ground that the sentence already undergone by the appellant is sufficient since the appellant has already undergone more than nine years of imprisonment.

5.0 Ms. Mita Panchal learned APP has supported the judgment and order passed by the Court below and has submitted that looking to the entire oral as well as documentary evidence available on record, the Court below was completely justified in convicting the appellant for the offence in question. Hence, no interference is required from this Court in this appeal.

6.0 Heard learned counsel for the respective parties and perused the entire oral as well as documentary evidence available on record. From the record, it transpires that the case of the prosecution mainly rests upon the documentary evidence viz. the dying declaration recorded by the Executive Magistrate at Exhibit – 42 and the F.S.L. Report at Exhibit – 67; and the oral evidence of PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 and PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 to prove the aspect of oral dying declaration and of PW – 4 Laxmanbhai Arjanbhai Dangar at Exhibit – 11 to prove the aspect of the so-called “extra-judicial confession” made by the appellant before a third

party.

7.0 In order to prove the Dying Declaration at Exhibit – 42, the prosecution has examined the Executive Magistrate – Anilkumar Ramaniklal Raval as PW – 16 at Exhibit – 40. On a plain reading of the Dying Declaration, it could be seen that there is not a single reference about the appellant much less about the alleged role played by him as the 'assailant'. In the Dying Declaration, the deceased has stated in clear terms that some “unknown person” had inflicted knife blows on him. The same fact has also been narrated by the Executive Magistrate – Anilkumar Ramaniklal Raval in his deposition as PW – 16 at Exhibit – 40. Thus, the Dying Declaration at Exhibit – 42 shall not be of any help to prove the guilt of the appellant.

8.0 The prosecution has relied upon the oral evidence of PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 and PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 in order to prove the aspect of oral dying declaration of the deceased.

9.0 PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 is the cousin brother of the deceased. In his deposition, PW – 11 has stated that at the time when the incident in question took place, he was at his house. He has categorically stated that at that time two persons, viz. PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 and one Pareshbhai Patel had come to his house and informed him that the deceased has been murdered and that the deceased has been admitted in the Hospital.

9.1 Here, it is required to be noted that in his cross-examination, this witness has admitted that the facts which have been narrated by him in the Court below were not narrated before the police or before anybody else, at any time, meaning thereby, that the said facts were narrated by him for the first time only before the Court below.

9.2 The fact that this witness is one of the two *'panch'* witnesses to the Inquest *'Panchnama'* at Exhibit – 29 establishes the fact that on hearing the information given by

PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 and said Pareshbhai Patel, this witness has immediately proceeded to the Civil Hospital so as to inquire about the condition of the deceased. But, unfortunately, by that time, the deceased had succumbed to his injuries and he had to stand as a *'panch'* witness to the Inquest '*Panchnama'* at Exhibit – 29.

10.0 PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 was a co-worker of the deceased. In his deposition, this witness has stated that on the date of the incident, one Pareshbhai Patel had come to his house at around 0500 hrs. and informed him that the deceased has been murdered yesterday night and that the deceased has been admitted in the Hospital. He has further deposed that thereafter, he, along with said Pareshbhai Patel and PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 had gone to the Hospital to see the condition of the deceased.

10.1 It is required to be noted that this witness has categorically deposed that he came to know about the

alleged incident in question only when one Pareshbhai Patel had informed him about the same. From his deposition, it appears that this witness has attempted to become a 'witness' to the oral dying declaration alleged to have been given by the deceased. However, in his cross-examination, this witness has admitted that the fact regarding the oral dying declaration given by the deceased before him was not stated by him either before the police or before anybody else meaning thereby, that the said fact was narrated by him for the first time only before the Court below.

11.0 Thus, the evidence led by both these witnesses viz. PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 and PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43, clearly lead us to believe that the same are not reliable, trustworthy and free from all doubts. Both these witnesses are hear-say witnesses and looking to the evidence which has come out from their cross-examinations, it is manifestly clear that their evidence is concocted and got-up one made with a view to involve the appellant in the alleged offence in question. Apart from that their evidence is also to be

considered keeping in mind the fact that one of them viz. PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 is a close relative of the deceased while the other, viz. PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43 was a co-worker of the deceased and also the fact that they belong to the same community and reside in the same Village as that of the deceased.

11.1 Further more, there is serious lacuna in the prosecution case inasmuch as the prosecution has not examined said “Pareshbhai Patel” as a prosecution witness for reasons best known to them, though his reference has been made by both the aforesaid witnesses in their depositions before the Court below. The said lacuna, in our view, would be fatal since it is established beyond doubt that the information regarding the 'murder' of the deceased was first known to them through said “Pareshbhai Patel” only. In that view of the matter, we are of the opinion that the evidence led by the said two witnesses shall not be of any help to the prosecution case as it suffers from many infirmities.

12.0 So as to prove the aspect of the so-called extra-judicial confession made by the appellant before a third party is concerned, the prosecution has examined PW – 4 Laxmanbhai Arjanbhai Dangar at Exhibit – 11. We have gone through the evidence led by this witness, who is also a resident of the same Village as that of the deceased. This witness has admitted in his chief-examination as well as cross-examination that he was informed about the alleged incident in question by the father of the appellant and that whatever he has deposed before the Court, the same was stated as per the information given to him by the father of the appellant. Hence, it is clearly established that the evidence led by this witness is "hear-say evidence" and, therefore, it could not be termed as an extra-judicial confession made by the deceased before a third party.

12.1 Here also, we would like to observe that the prosecution case suffers from another lacuna inasmuch as it has not examined the father of the appellant – Arjanbhai Shivabhai for reasons best known to them, though his

reference has been made by PW – 4 in his deposition at Exhibit – 11. Thus, there are serious lapses in the case of the prosecution.

13.0 So far as the fact regarding the human blood stains found from the clothes of the appellant is concerned, it is a matter of record that the Blood Group of both the deceased as well as the appellant are same, i.e. Blood Group 'B'. Thus, simply because the blood stains found on the clothes of the appellant are similar to the Blood Group of the deceased, it could not be concluded that the appellant is the author of the alleged offence in question, more particularly, when the Blood Group of both the deceased and the appellant are similar and there is no other evidence on record, as discussed herein above, pointing towards the guilt of the appellant. The Court below has also not placed reliance upon the above-referred aspect since the Blood Group of both the deceased and the appellant are similar. Hence, the said story put forward by the prosecution also does not hold any ground and deserves to be rejected.

14.0 Before concluding, we would like to state that undoubtedly, the case of the prosecution mainly rests upon the evidence led by the aforesaid three witnesses, viz. PW – 4 Laxmanbhai Arjanbhai Dangar at Exhibit – 11, PW – 11 Manubhai Harjibhai Rajput at Exhibit – 28 and PW – 17 Arjunbhai Dashrathbhai Maratha at Exhibit – 43. Essentially, the evidence led by them rests upon the information given by "Pareshbhai Patel" and "Arjanbhai Shivabhai". However, for reasons best known to the prosecution, both these persons have not been examined thereby, making the evidence led by the aforesaid three witnesses vulnerable. Thus, there is serious lacuna in the manner the prosecution was conducted before the Court below and no satisfactory explanation has come forward as regards the same.

15.0 In view of the above discussion, we are of the considered opinion that the Court below has committed serious error in law and on facts in convicting the appellant for the alleged offence in question. It appears that the Court below has proceeded on mere conjectures and surmises

without properly appreciating the oral as well as documentary evidence available on record. Hence, the impugned judgment and order passed by the Court below deserves to be quashed and set aside.

16.0 For the foregoing reasons, the Appeal is allowed. The impugned judgment and order dated 1st March, 1999 passed by the learned Sessions Judge, Rajkot in Sessions Case No.129 of 1998 is quashed and set aside. The appellant – accused is acquitted of all the charges levelled against him. The appellant – accused is in jail and, therefore, the Jail Authority is directed to release the appellant – accused from the custody forthwith, if he is not required in connection with any other offence.

[R. P. DHOLAKIA, J.] **[K. S. JHAVERI, J.]**

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